No. 86-1728

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO CAHOON,
Appellant,

vs.

ALTON PACKAGING CORPORATION,
JEFFERSON SMURFIT CORPORATION, and
JEFFERSON SMURFIT GROUP, LTD.,
Appellees.

On Appeal From The Appellate Court
of Illinois, Fifth District

JURISDICTIONAL STATEMENT

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April 27, 1987

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QUESTION PRESENTED

Whether the Illinois Human Rights Act, *Ill. Rev. Stat.* ch. 68, §8-111(C) (1985), formerly *Ill. Rev. Stat.* ch. 68, §8-111(D) (1983), as enacted or construed, violates the Supremacy Clause of the United States Constitution by prohibiting the filing of claims under the federal Age Discrimination in Employment Act (ADEA) 29 U.S.C. §621, *et seq,* in Illinois courts, unless state administrative remedies have been exhausted, contrary to the express terms of the ADEA.

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On Appeal From The Appellate Court
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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, attached as Appendix A, is reported at 148 Ill.App.3d 480, 499 N.E.2d 522, 101 Ill.Dec. 934 (5th Dist. 1986), leave to appeal denied (February 6, 1987).

JURISDICTION

Leo Cahoon, Appellant, appeals from the judgment and decision of the Appellate Court of Illinois, Fifth Judicial District, which was entered September 24, 1986. This decision reversed a jury verdict and judgment for Leo Cahoon entered in the trial

court on November 4, 1985, under a claim made pursuant to the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* (1985). A Petition for Rehearing was denied by the Appellate Court on November 7, 1986, and a Petition for Appeal as a Matter of Right, or, Alternatively, for Leave to Appeal to the Illinois Supreme Court was denied by that court on February 6, 1987.

A Notice of Appeal to this Court was filed in the Appellate Court of Illinois, Fifth District, on March 9, 1987, with Proof of Service.

This appeal is being docketed in this Court within 90 days after the denial of the Petition for Appeal as a Matter of Right, or, Alternatively, for Leave to Appeal.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). 28 U.S.C. §2403(b) may be applicable to this cause.

CONSTITUTIONAL PROVISIONS & STATUTES

Supremacy Clause, United States Constitution, Article VI §2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Age Discrimination in Employment Act, 29 U.S.C. §626(c)(1) (1985):

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . .

Age Discrimination in Employment Act, 29 U.S.C. §633 (1985):

Federal-State Relationship

(a) Federal action superseding state action.

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under §626 of this Title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

Illinois Human Rights Act, *Ill. Rev. Stat.* ch. 68, §8-111(C) (1985), formerly *Ill. Rev. Stat.* ch. 68, §8-111(D) (1983)[1]:

Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

---

[1] Public Act of Illinois, 84-717, effective Jan. 1, 1986, redesignated former subdivision (D) as (C).

STATEMENT OF THE CASE AND HOW THE FEDERAL AND CONSTITUTIONAL QUESTION WAS RAISED

Plaintiff Leo Cahoon was fired from his employment with defendants as corrugator supervisor on November 30, 1981. He had been employed by defendants for 16 years and was 60 years old when terminated. (R. 138, 150-151).

Plaintiff filed a formal charge of age discrimination with the Illinois Human Rights Commission and the federal Equal Employment Opportunity Commission (EEOC) on February 18, 1982. (R. Appendix A-1). After waiting in excess of the 60 days required by 29 U.S.C. §633(b), on August 11, 1982, plaintiff filed his Complaint alleging age discrimination in violation of the Age Discrimination in Employment Act (hereinafter ADEA) in the Illinois Circuit Court, Third Judicial Circuit, Madison County, Illinois. (C. 2). Defendants did not seek removal of this suit.

On December 14, 1982, defendants filed an Objection to the Jurisdiction of the Illinois Human Rights Commission and a Motion to Stay on the basis that an ADEA action was pending in the Circuit Court, and that pursuant to the ADEA, 29 U.S.C. §633(a), the state administrative proceeding was superseded. (R. Appendix C-3). Plaintiff agreed, and the Illinois Human Rights Commission ordered the administrative proceeding stayed pending the outcome of the state court suit. (R. Appendix C-4).

Thereafter, the ADEA claim went to trial before a jury in the Madison County Circuit Court in February, 1985. At no time in the trial court did defendants object or question subject matter jurisdiction. The jury returned a verdict for plaintiff under the ADEA in the amount of $67,500.00 for past lost wages. (R. 505, C. 183). The trial court awarded an additional $147,310.00 in future wages and benefits, attorneys' fees and costs, pursuant to the parties' stipulation that these elements of damage under the ADEA would be assessed by the court. (C. 267). Defen-

dants filed a timely Notice of Appeal to the Appellate Court of Illinois, Fifth District, and on January 13, 1986 filed their Appellants' Brief.

Defendants raised eight points in their Appellate brief, one being that the Illinois Circuit Court lacked subject matter jurisdiction over ADEA claims on the basis of Section 8-111(C) of the Illinois Human Rights Act, *Ill. Rev. Stat.* ch. 68, §8-111(C) (formerly ch. 68, §8-111(D) (1983)). This was the first time this contention had been made in either the administrative or judicial forum.

The Appellate Court reversed the judgment outright, agreeing that Illinois Circuit Courts did not have subject matter jurisdiction of ADEA claims "unless state administrative remedies have been exhausted" and suggesting that Illinois courts could decline to hear ADEA suits and require that they be processed through the state administrative agency only. *Cahoon v. Alton Packaging Corp.*, 148 Ill.App.3d 480, 499 N.E.2d 522, 101 Ill.Dec. 934 (5th Dist. 1986).

Plaintiff timely filed a Petition for Rehearing asserting the unconstitutionality of the Illinois statute (*Ill. Rev. Stat.* ch. 68, §8-111(C), formerly *Ill. Rev. Stat.* ch. 68, §8-111(D)), and asserting that exhaustion of state administrative remedies, which had not been argued by defendants, was not required. The question of the subject matter jurisdiction of the Illinois Courts for ADEA claims was thus first raised in the Appellate Court briefs of both parties. That the Illinois legislature had no authority to restrict or reject substantive rights created by Congress, as a matter of preemption, was first raised in plaintiff's Appellate Court brief. The specific assertion that ch. 68 §8-111(D), as enacted or as construed, violated the Supremacy Clause, was first specifically stated in plaintiff's Petition for Rehearing after the Appellate Court ruled that this statute required a plaintiff to follow the state administrative framework, an argument not advanced by defendants in their brief and therefore not addressed by plaintiff in response.

Plaintiff's Petition for Rehearing was denied by the Appellate Court, and subsequently plaintiff's Petition for Appeal as a Matter of Right, or, Alternatively for Leave to Appeal was denied by the Illinois Supreme Court.

THE QUESTION IS SUBSTANTIAL

As a result of the decision appealed from, Illinois now prohibits access to its courts by ADEA claimants until state administrative remedies are exhausted, contrary to the express language of the federal statute and contrary to established federal law. This state-imposed requirement violates the doctrine of preemption under the Supremacy Clause of the United States Constitution (U.S. Const., Art. VI §2). The result is to impose burdens upon an ADEA plaintiff in Illinois that exist in no other state, and to undermine the very efficacy that the ADEA intended to promote by explicitly addressing this question and eliminating any exhaustion of remedies requirement.

The decision by the Illinois Appellate Court has overturned the well recognized and accepted procedures for handling ADEA claims, at least in the State of Illinois. It is submitted that if this decision is not reviewed, other states will undoubtedly adopt its rationale. Ultimately, Illinois, and other states, will presumably apply its rationale to other civil rights suits, *e.g.*, 42 U.S.C. §1983, if for no other reason than to alleviate their allegedly congested dockets. Plaintiff will demonstrate that (1) Illinois courts have concurrent jurisdiction of ADEA claims; (2) exhaustion of state administrative remedies is not required; (3) a requirement of exhaustion of remedies violates the Supremacy Clause of the U.S. Constitution; (4) mandatory use of the Illinois administrative forum provided denies substantial rights; and (5) reversal is required not only to correct the error as to this plaintiff, but also for other ADEA plaintiffs whose claims have been or may be essentially extinguished in Illinois by this decision.

Plaintiff's cause of action was based on the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 *et seq.* It is evident from the statutory language, legislative history and case law that the United States Congress determined that state and federal courts would have concurrent jurisdic-

tion, which grants plaintiff his choice of forum in either a state or federal court. 29 U.S.C. §626(c)(1) states:

> Any person aggrieved may bring a civil action in *any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this chapter . . . . (emphasis added).

In *Jacobi v. High Point Label, Inc.*, 442 F.Supp. 518 (M.D.N.C. 1977), the court pointed out:

> Clearly, Congress intended for a person aggrieved by a violation of the Age Discrimination Act to have the right to bring his action in state court. 442 F.Supp. at 521.

The legislative history also states that the ADEA provides for concurrent jurisdiction. 1967 *U.S. Cong. & Ad. News* (90th Cong.) 2213 at 2218. *Eagleburger v. City of Springfield,* 677 S.W.2d 914, 915 (Mo. Ct.App. 1984) reached the same result and held that Missouri trial courts had subject matter jurisdiction of an ADEA claim. *See also, Baldwin v. Sears Roebuck & Co.*, 667 F.2d 458, 461 (5th Cir. 1982). No cases have held to the contrary.

Illinois circuit courts are courts of competent and general jurisdiction. Ill. Const. Art. VI §7 (1970), provides:

> Circuit courts shall have original jurisdiction of all justiciable matters . . . .

The Illinois legislature may not deprive Illinois circuit courts of their original jurisdiction, nor can their jurisdiction be changed or abridged by an act of the legislature. *Ruth v. Aurora Sanitary District,* 17 Ill.2d 11, 158 N.E.2d 601, 605 (1959), and *Skilling v. Skilling,* 104 Ill.App.3d 213, 432 N.E.2d 881, 886 (1st Dist. 1982).

The conclusion of the Illinois Appellate Court that an Illinois court must dismiss an ADEA case "unless state administrative

remedies have been exhausted", 499 N.E.2d 523, 524, directly contradicts the ADEA itself and decisions of this Court. 29 U.S.C. §633, entitled *Federal-State Relationship,* provides:

> (a) Federal action superseding State action.
>
> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age *except that upon commencement of action under this chapter such action shall supersede any State action.* (emphasis added).

It further provides:

> (b) Limitation of Federal action upon commencement of State proceedings.
>
> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under §626 of this Title before the expiration of 60 days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated . . . . (emphasis added).

In *Oscar Mayer and Company v. Evans,* 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed. 2d 609 (1979), this Court specifically addressed and rejected the assertion that exhaustion of state administrative remedies was required. This Court held that §633(b) was intended to give state agencies only a *limited opportunity* to resolve problems of employment discrimination and to screen those cases capable of early resolution. 441 U.S. at 755. This Court concluded that besides *commencement* of state administrative proceedings more than 60 days prior to filing a complaint, *no other obligations* were placed on ADEA claimants. 441 U.S. at 759. In this case, plaintiff followed this

directive by waiting 173 days after commencing his state administrative proceeding before filing his civil suit. There is no question that plaintiff has complied with all ADEA statutory requirements, and had his suit been filed in federal court, it would be "on all fours" with the holding in *Oscar Mayer & Company v. Evans,* 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed. 2d 609 (1979).

Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947) held that states are not free to refuse enforcement of a valid federal statute. At issue in *Testa* was a claim under the federal Emergency Price Control Act which gave jurisdiction to "any court of competent jurisdiction", just as the ADEA does. The Rhode Island Supreme Court ruled that Rhode Island courts could decline to hear such a suit which it said was based on a foreign penal statute. The United States Supreme Court reversed and held that Rhode Island could not decline or refuse to hear such a suit.

According to *Testa,* earlier Supreme Court cases had repudiated the assumption that federal laws can be considered by the states as emanating from a foreign sovereign and held that when Congress speaks through legislation, such legislation becomes the policy of every state and "should be respected accordingly in the courts of the States." 330 U.S. at 391, 392. *Testa* held that the state court had "jurisdiction adequate and appropriate under established local law to adjudicate this action." 330 U.S. at 394.

That the obligation of states to enforce federal laws rests squarely in the Supremacy Clause was verified in *Federal Energy Regulatory Com'n v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). This case also rejected the notion that states entertain federal actions solely as a discretionary matter of comity. 456 U.S. at 763 n.28. *See also, Second Employers' Liability Cases (Mondou v. New York, N.H. & H.R. Co.),* 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912), and *Claflin v. Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1876).

Interestingly, the Illinois Supreme Court in *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N.E.2d 210 (1944), decided the precise issue presented in *Testa* three years earlier. The Illinois Supreme Court ruled the same way as *Testa* was decided, and recognized that because the laws of the United States were the laws of the State of Illinois, plaintiff was entitled to his choice of forum:

> It follows that when Congress grants a right and makes no provision with reference to the courts in which the right may be enforced, a suit to enforce such right may be brought in any State or Federal court having general jurisdiction of the class of cases to which the particular action belongs. When the Congress creates a right and provides that the State and Federal Courts shall have concurrent jurisdiction of suits to enforce it, such grant of concurrent jurisdiction implies that the plaintiff, in the first instance, shall have the choice of the court in which to bring the action. He is entitled to whatever remedial advantages inhere in the particular forum.
>
> The result is that whether the act be regarded as penal or remedial, makes no difference in this case. It is not a law of foreign sovereignty. The Emergency Price Control Act is a law of Illinois and enforceable as such. The courts of Illinois have not been denied jurisdiction by the act. Such jurisdiction has been expressly granted to them, concurrent with the Federal courts. 54 N.E.2d at 218.

The argument advanced by defendants that federal statutes take state courts "as it finds them" is correct as far as it goes. However, this doctrine does not mean that ADEA claims should or can be pursued through a state's *administrative* forum only. This doctrine means that conditions imposed by the state court must be conditions for every other litigant who seeks access to its courts. *Brown v. Gerdes,* 321 U.S. 178, 190, 64 S.Ct. 487, 493, 88 L.Ed. 659 (1944). The requirement that conditions

must be applied across the board, regardless of the basis of the claim, also is present in the so-called "valid excuse" cases. C. Wright, *The Law of Federal Courts,* §45 at 269 (4th ed. 1983). This Court has asserted federal control over incidents of state trial practice in Federal Employers' Liability Act (FELA) cases that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. *Norfolk & W. Ry. Co. v. Liepelt,* 444 U.S. 490, 503, 100 S.Ct. 755, 762, 62 L.Ed. 2d 689 (1980). It should do no less for ADEA plaintiffs. Further, the filing and deferral provisions of the ADEA have been held sustantive and not procedural. *Whitfield v. City of Knoxville,* 756 F.2d 455 (6th Cir. 1985).

There is reason to question whether the Illinois Appellate Court correctly construed the state statute in question. It appears that the legislature recognized the requirements of the ADEA (and other laws) in the statute itself by the provision "Except as otherwise provided by law...". Second, as discussed *supra,* since the Illinois legislature may not deprive, change or abridge the original jurisdiction of the circuit courts, which is established by the Illinois Constitution, it is unlikely that the legislature intended the construction given the Illinois statute by the Appellate Court. Whether or not the Appellate Court's construction of the state statute is correct, that construction creates a substantial deprivation of federal rights.

Most significant is the right to a jury trial. Claims under the Illinois Human Rights Act are heard by an administrative law judge whose decision is subject to review only pursuant to the Administrative Review Act. Venue for judicial review is directly to the Appellate Court, which determines if factual findings are contrary to the manifest weight of the evidence. *Ill. Rev. Stat.* ch. 68, §8-111 (A)(2) & (A)(3). The doctrine of *res judicata* bars later judicial action where such claims have been administratively litigated and judicially reviewed. *Kremer v. Chemical Construction Co.,* 456 U.S. 742, 102 S.Ct. 1883, 72 L.Ed.2d 689 (1980). On the other hand, a jury trial is a matter of right in

ADEA cases. 29 U.S.C. §626 (c)(2). However, a plaintiff in Illinois must exhaust his administrative remedies before filing his ADEA claim. When he thereafter files his ADEA claim, it will be decided on the results of the state administrative proceedings under the principles of preclusion and *res judicata,* and he is effectively denied his right to a jury trial.

A second deprivation to plaintiff is his choice of forum. The ADEA grants plaintiff his choice of a federal or state forum both at the administrative and judicial stages. The Illinois statute, as construed, defeats absolutely his right to choose the state judicial forum notwithstanding the ADEA's directive that he can file in any *court* of competent jurisdiction.

In addition, there is no known authority under the Illinois Human Rights Act for the imposition of either liquidated (punitive) or future damages, as opposed to the remedy of reinstatement. *Ill. Rev. Stat.* ch. 68, §8-108. Therefore, the remedies provided by the HRA may not be as complete as under the ADEA which authorizes liquidated damages and future damages in appropriate cases. Future damages are part of the award won by the plaintiff in this case.

Also, the statute of limitations under the ADEA, which is two years, is not tolled by the filing of a claim with a state administrative agency; in fact, this statute of limitations is only tolled for a period of one year to the extent that the *federal* EEOC is attempting to effect voluntary compliance. 29 U.S.C. §626(e)(1) and (2). Accordingly, a plaintiff who is required to institute and pursue procedures pursuant to the Human Rights Act to the conclusion, including administrative review, would be barred by the statute of limitations when he filed his ADEA claim at the conclusion, as the Court's opinion suggests he must. The Illinois HRA contains no time limits within which the administrative proceeding must be completed.

Plaintiff's claim, first formally asserted in February, 1982, is now over 5 years old. The need for expeditious processing of

ADEA claims, strongly noted in the *Oscar Mayer v. Evans* decision, has been frustrated. This question needs resolution to avoid repetition of this onerous procedure in other cases and to allow this plaintiff vindication of his claim.

CONCLUSION

For the reasons set forth, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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April 27, 1987

APPENDIX

APPENDIX A

Leo Cahoon,
Plaintiff-Appellee,

v.

Alton Packaging Corporation; Jefferson Smurfit Corporation; and Jefferson Smurfit Group, Ltd.,
Defendants-Appellants.

No. 5-85-0770

Appellate Court of Illinois,
Fifth District

Sept. 24, 1986

Rehearing Denied Nov. 7, 1986

Al J. Pranaitis, Hoagland, Maucker, Bernard & Almeter, Alton, for defendants-appellants.

Freeark, Harvey & Mendillo, Belleville, and Callis & Hartman, Granite City, for plaintiff-appellee; James R. Mendillo and Michael J. Meehan, of counsel.

Justice WELCH delivered the opinion of the court:

Plaintiff Leo Cahoon brought this action for damages against his ex-employer, Alton Packaging Corporation, for damages and reinstatement under the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. §621 *et seq.*), and for breach of an oral contract of employment. Plaintiff sought relief against defendants Jefferson Smurfit Corporation and Jefferson Smurfit Group, Ltd., on the basis that Alton Packaging was the agent or instrumentality of the other two defendants. After a trial, a Madison County jury found for defendants on the count alleging an oral contract, and for plaintiff on the ADEA counts. The circuit court entered judgment for defendants on

the contract claim, and denied reinstatement and entered judgment in excess of $214,800 plus costs against all three defendants on the ADEA counts. Defendants appeal. There is no cross-appeal.

Of defendants' numerous contentions on appeal, we consider only defendants' contention that the circuit court was without subject matter jurisdiction in this case. Jurisdiction is of two types, jurisdiction of subject matter and jurisdiction of the person. Defects in jurisdiction of the person may be waived. Absent subject matter jurisdiction, the court is without authority to consider or act on a case before it other than to dismiss it. Lack of jurisdiction over the subject matter cannot be waived, nor may a party be deemed estopped to raise the issue. *Volkmar v. State Farm Mut. Auto. Ins. Co.* (1982), 104 Ill.App.3d 149, 151, 60 Ill.Dec. 250, 252, 432 N.E.2d 1149, 1151.

Section 8-111(C) of the Illinois Human Rights Act ("HRA") states: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." (Ill.Rev.Stat.1985, ch. 68, par. 8-111(C).) Article 8 of the HRA (Ill.Rev.Stat.1985, ch. 68, par. 8-101 *et seq.*) provides for hearings on human rights complaints by the Illinois Human Rights Commission, and further provides for review of decisions of that Commission in accordance with the provisions of the Administrative Review Law (Ill.Rev.Stat.1985, ch. 110, par. 3-101 *et seq.*). (Ill.Rev.Stat.1985, ch. 68, par. 8-111(A).) These provisions require an HRA claimant, including an age discrimination claimant, to exhaust administrative remedies prior to bringing an action in the Illinois courts. See *Mein v. Masonite Corp.* (1984), 124 Ill.App.3d 617, 619, 80 Ill.Dec. 154, 156, 464 N.E.2d 1137, 1139, *aff'd* (1985), 109 Ill.2d 1, 92 Ill.Dec. 501, 485 N.E.2d 312. In our view the plain language of Section 8-111(C) requires that an Illinois court dismiss an ADEA case unless state administrative remedies have been exhausted.

Plaintiff does not contend that our legislature intended otherwise. Rather, plaintiff maintains the intent of the legislature does not control the jurisdiction of the court in this situation. Plaintiff's complaint alleged a violation of the ADEA which provides in part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act * * *." (29 U.S.C. §626(c)(1) does not purport to confer jurisdiction. (See generally 20 Am.Jur.2d *Courts* §§ 91, 93 (1965).) None of the cases cited by plaintiff supports the conclusion that a civil rights claimant may ignore the administrative framework provided by our legislature.

Like the HRA, the ADEA provides administrative procedures and remedies. Under the ADEA no civil action may be commenced by an individual until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary of Labor, whose duty is to notify named prospective defendants and seek to eliminate any alleged unlawful practice "by informal methods of conciliation, conference, and persuasion." (29 U.S.C. § 626(d).) Apparently in the instant case the Secretary was duly notified. We do not view that act as conferring jurisdiction on the circuit court in light of our legislature's mandate to the contrary. See *People v. Lang,* (1978), 62 Ill.App.3d 688, 704, 19 Ill.Dec. 231, 244, 378 N.E.2d 1106, 1119, *aff'd in part, rev'd in part* (1979), 76 Ill.2d 311, 29 Ill.Dec. 87, 391 N.E.2d 350, *cert. denied* (1979), 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed.2d 326, *cert. denied* (1980), 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731.

Plaintiff argues the Illinois courts are not free to "discriminate" against federal claims. We only decide here that the federal civil rights claim must be prosecuted under the same procedure applicable to a state civil rights claim. Discrimination against the federal claim is not in question here. Rather, we find in section 8-111(C) of the HRA our legislature's plain directive that a civil rights claim be prosecuted in the administrative

forum before it reaches the court, and that a complaint which invokes a federal claim is not entitled to preferential treatment in that regard. Messrs. Wright and Miller, relied upon by plaintiff, write:

> "For present purposes, it is enough to note that state courts may not arbitrarily deny enforcement to federal statutory claims similar to state law claims that lie within their ordinary jurisdiction. If proper procedure is followed in presenting the claim, state law is not independent to apply a principle of nonenforcement.
>
> * * * * * *
>
> Whatever may be the extent of the obligation imposed on state courts to remedy federal wrongs, much room is left to control the form of the remedy and to impose reasonable limits on its availability. The *Ward* decision [*Ward v. Board of County Comm'rs.* (1920), 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419] expressly left open the possibility that the claim might be denied under the state statute of limitations. In *McCoy v. Shaw* [(1928), 277 U.S. 302, 72 L.Ed. 891, 48 S.Ct. 519], a similar case, the Court affirmed denial of anticipatory equitable relief on the ground that the state could properly require relief to be sought by payment of the taxes and suit for recovery. The same principle appears in other contexts as well.
>
> * * * * * *
>
> Whatever the extent to which state courts are obliged to provide some remedy for federal claims, then, it rests on principles of the nonindependence of state law. Once an effective remedy is made reasonably available, state procedural limitations remain generally independent of federal law, and need survive only the basic tests of adequacy." 16 Wright & Miller [Cooper & Gressman], Federal Practice & Procedure §4024 (1977).

Finally, we find *Parks v. Illinois Dep't of Mental Health* (1982), 110 Ill.App.3d 184, 65 Ill.Dec. 695, 441 N.E.2d 1209, inapposite. Section 626(c)(1) of the ADEA does not appear to support a preemption argument, there being no actual conflict between section 626(c)(1) and the HRA. In any event, plaintiff does not expressly argue preemption in his brief.

For the foregoing reasons, the judgment of the circuit court of Madison County insofar as it pertains to plaintiff's age discrimination claims is vacated, and to that extent the cause is dismissed. The judgment insofar as it denies plaintiff's contractual claim is affirmed.

VACATED AND DISMISSED IN PART; AFFIRMED IN PART.

JONES and KARNS, JJ., concur.

APPENDIX B

No. 5-85-0770

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Leo Cahoon,
Plaintiff-Appellee,

vs.

Alton Packaging Corporation, et al.,
Defendants-Appellants.

Appeal from the Circuit Court of Madison County

No. 82-L-627

Honorable Horace L. Calvo, Judge Presiding.

ORDER

(Filed November 7, 1986)

This cause having been considered on appellee's petition for leave to appeal and motion for leave to supplement the record pursuant to Supreme Court Rule 329 (103 Ill. 2d R. 329) and/or to amend the pleadings pursuant to Supreme Court Rule 362 (103 Ill. 2d R. 362) and the court being fully advised in the premises:

IT IS THEREFORE ORDERED that appellee's motion for leave to supplement the record and/or to amend pleadings shall be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that appellee's petition for rehearing shall be, and the same hereby is, DENIED.

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706

February 6, 1987

Mr. James R. Mendillo
Freeark, Harvey & Mendillo
P.O. Box 423
Belleville, IL 62222

No. 64508 - Leo Cahoon, petitioner, v. Alton Packaging Corporation, et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on March 2, 1987.

APPENDIX D

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-85-0770

Leo Cahoon,
Plaintiff-Appellant,

v.

Alton Packaging Corporation; Jefferson Smurfit Corporation, and Jefferson Smurfit Group, Ltd.,
Defendants-Appellees.

Madison County No. 82-L-627

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed March 9, 1987)

Notice is hereby given that plaintiff-appellant Leo Cahoon hereby appeals to the Supreme Court of the United States from the judgment of the Appellate Court of Illinois, Fifth District, which judgment was entered September 24, 1986, and reversed the judgment entered for plaintiff-appellant Leo Cahoon by the Circuit Court of Madison County, Illinois, on or about November 4, 1985. A Petition for Appeal as a Matter of Right, or, Alternatively, for Leave to Appeal to the Illinois Supreme Court was denied on February 6, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

FREEARK, HARVEY, MENDILLO
& DENNIS

By JAMES R. MENDILLO
115 West Washington Street
Post Office Box 423
Belleville, Illinois 62222
(618) 233-2686

Attorneys for Plaintiff-Appellant
Leo Cahoon

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS }
COUNTY OF ST. CLAIR }

The undersigned attorney does hereby certify and state that he has caused a true copy of the foregoing document, a Notice of Appeal, to be served upon Mr. Al J. Pranaitis, Hoagland, Maucker, Bernard & Almeter, 401 Alton St., P.O. Box 130, Alton, Illinois, 62002, attorney for defendants, and upon Pratt & Callis, 1326 Niedringhaus Ave., P.O. Box 1326, Granite City, Illinois, 62040, co-counsel for plaintiff-appellant, by causing the same to be placed in a sealed envelope, clearly addressed as aforesaid, with postage fully prepaid, and by depositing said envelopes in a United States Post Office mailbox in Belleville, Illinois, on the 6th day of March, 1987, at approximately 3:00 p.m. o'clock.

/s/ James R. Mendillo

James R. Mendillo, being duly sworn, deposes and states that the matters contained in the foregoing Affidavit of Service are true.

/s/ James R. Mendillo

Subscribed and sworn to before me this 6th day of March, 1987.

/s/ Sara Jane Tipton
Notary Public

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1728

In The
Supreme Court of the United States
October Term, 1986

—o—

LEO CAHOON,

Appellant,

vs.

ALTON PACKAGING CORPORATION, JEFFERSON SMURFIT CORPORATION, and JEFFERSON SMURFIT GROUP, LTD.,

Appellees.

—o—

On Appeal From The Appellate Court Of Illinois, Fifth District

—o—

MOTION TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE STATE COURT

—o—

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Counsel for Appellees

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QUESTION PRESENTED

Did Appellant, LEO CAHOON, timely raise a Federal question in the State Court, when he failed to do so until filing a Petition for Rehearing after the decision of the Illinois Appellate Court, even though before any Briefs had been filed in the Appellate Court, the Illinois Supreme Court had rendered an opinion that the Illinois Courts have no jurisdiction to entertain cases of alleged civil rights violations, except on administrative review from the Illinois Human Rights Commission, and even though this lack of jurisdiction was a basis of the appeal before the Appellate Court and the Appellate Court decided the issue without any discussion of the U. S. Constitution or Amendments?

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MOTION TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT OF THE STATE COURT

Now come the Appellees, ALTON PACKAGING CORPORATION, JEFFERSON SMURFIT CORPORATION, and JEFFERSON SMURFIT GROUP, LTD., by AL J. PRANAITIS of HOAGLAND, FITZGERALD, SMITH & PRANAITIS, their attorneys, and hereby move this Honorable Supreme Court to dismiss this Appeal or to affirm the judgment of the Illinois Appellate Court, Fifth District, and in support thereof, said Appellees state that the Federal questions sought to be reviewed were neither timely nor properly raised before the State Courts of the State of Illinois nor expressly passed on by the State Courts of the State of Illinois.

———o———

OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is attached as Appendix A to the Appellant's Jurisdictional Statement, and is reported at 148 Ill.App.3d 480, 499 N.E.2d 522, 101 Ill.Dec. 934 (Fifth District, 1986), leave to appeal denied (Feb. 6, 1987).

———o———

STATEMENT OF THE CASE

Appellant, LEO CAHOON (hereinafter referred to as "CAHOON"), filed an action in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, against the Appellees, ALTON PACKAGING CORPORATION; JEFFERSON SMURFIT CORPORATION; and JEF-

FERSON SMURFIT GROUP, LTD. (collectively referred to hereinafter as "ALTON"), claiming that his termination from employment with ALTON had been in violation of the Federal Age Discrimination in Employment Act (ADEA) (29 U.S.C.A., Par. 621, et seq.), and in breach of an oral promise. The case proceeded to jury trial and resulted in judgment in favor of CAHOON under the ADEA and against CAHOON and in favor of ALTON with respect to the breach of oral promise claim.

After CAHOON had filed his suit in the Circuit Court, but prior to the matter going to trial, the administrative proceeding which was pending before the Illinois Human Rights Commission under the Illinois Human Rights Act (Ill.Rev.Stat., Ch. 68, Par. 1-101, et seq.) was stayed pending the outcome of the suit. The stay has never been lifted, and CAHOON's age discrimination claim is still pending before the Illinois Human Rights Commission.

After the judgment was entered in the Circuit Court, ALTON duly appealed to the Illinois Appellate Court, Fifth District, from the judgment in favor of CAHOON and against ALTON on the ADEA claim. CAHOON did not cross-appeal from the judgment entered against him and in favor of ALTON on the breach of oral promise claim, and that part of the case is not in issue.

In the Brief filed in behalf of ALTON in the Illinois Appellate Court, eight different issues were raised attacking the judgment that had been rendered in favor of CAHOON. The first issue raised was whether the judgment entered in favor of CAHOON and against ALTON was void and unenforceable because the Trial Court lacked subject matter jurisdiction over the ADEA claim. In Septem-

ber of 1985, and prior to the filing of the Briefs before the Illinois Appellate Court in this case, the Illinois Supreme Court had issued its opinion in *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985). *Mein* was discussed and quoted at length in the argument presented by ALTON on the jurisdictional issue raised in the Brief. A copy of that portion of ALTON's Brief that was filed in the Appellate Court is attached hereto as Appendix A.

In the Brief filed by CAHOON in the Illinois Appellate Court, Fifth District, no argument was made that it would be in violation of the Supremacy Clause of the United States Constitution or any other part of the Constitution or Amendments thereto for the Illinois Appellate Court to rule that the Circuit Court did not have jurisdiction over CAHOON's age discrimination claim. The part of CAHOON's Brief filed in the Illinois Appellate Court, Fifth District, discussing the jurisdictional issue is attached hereto as Appendix B.

Thereafter, the Illinois Appellate Court rendered its opinion vacating and dismissing the judgment that had been entered in favor of CAHOON in the Trial Court. The Appellate Court opinion agreed with ALTON's argument that the Circuit Court had lacked jurisdiction over CAHOON's age discrimination claim. Nowhere in the Appellate Court opinion is there any discussion of the Supremacy Clause or other parts of the U.S. Constitution or Amendments thereto. Of course, because the Appellate Court decided the case on the jurisdictional ground, the Appellate Court did not reach the seven other issues that had been raised by ALTON on the appeal to the Illinois Appellate Court.

Thereafter, CAHOON filed a Petition for Rehearing in the Illinois Appellate Court, Fifth District, which, for the first time, asserted a violation of the Supremacy Clause of the United States Constitution and other portions of the Constitution or Amendments thereto. The Petition for Rehearing was denied wihout any opinion being written by the Illinois Appellate Court. Subsequently, CAHOON filed a Petition for Appeal as a Matter of Right or, Alternatively, For Leave to Appeal to the Illinois Supreme Court, which also was denied without an opinion being written.

—o—

ARGUMENT

THE FAILURE OF APPELLANT TO PROPERLY AND TIMELY RAISE A QUESTION UNDER THE UNITED STATES CONSTITUTION BEFORE THE STATE COURT AND THE LACK OF ANY DECISION BY THE STATE COURT OF A CONSTITUTIONAL ISSUE DEPRIVES THIS UNITED STATES SUPREME COURT OF JURISDICTION

It is well settled that an attempt to raise a Federal question for the first time in a Petition for Rehearing, after judgment, comes too late and will not be recognized as properly within the jurisdiction of the United States Supreme Court. (*Loeber v. Schroeder,* 149 U.S. 580, 37 L.Ed. 856, 13 S.Ct. 934; *Sayward v. Denny,* 158 U.S. 180, 39 L.Ed. 941, 15 S.Ct. 777.) It is also well settled that an attempt to raise a Federal question in a State Court after judgment, on a Petition for Rehearing, does not furnish a basis

for review by the Supreme Court of the United States, unless the State Court actually entertains the question and decides it. (*Jett Brothers Distilling Co. v. Carrollton,* 252 U.S. 1, 64 L.Ed. 421, 40 S.Ct. 255; *Wall v. Chesapeake & O.R. Co.,* 256 U.S. 125, 65 L.Ed. 856, 41 S.Ct. 402; *Herndon v. Georgia,* 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794.) An exception to these well-established rules applies where the question first arises from the unanticipated act of the State Court in giving to a Statute a new construction which threatens rights under the Constitution. (*Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145; *Herndon v. Georgia,* supra.) On the other hand, the exception will not apply if the ruling should have been anticipated, particularly, where the Court has, in substance, construed the Statute in substantially the same fashion before. (*Herndon v. Georgia,* supra.)

Before the Illinois Appellate Court, Fifth District, ALTON, as the Appellant there, filed its Brief by mailing it to the Appellate Court on January 13, 1986. Thereafter CAHOON, who was the Appellee in the Appellate Court, filed his Brief by mailing it to the Illinois Appellate Court on March 25, 1986. Prior to the filing of these Briefs, the Illinois Supreme Court had rendered its opinion in *Mein v. Masonite Corporation,* (9/20/85) 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (Reh. den. 12/2/85). In that case, which was cited and quoted at length in ALTON's Brief filed with the Illinois Appellate Court, the Illinois Supreme Court held that:

> 8-111(D) of the Illinois Human Rights Act, Ill.Rev. Stat., Ch. 68, Par. 8-111(D)] which is set out above,

> "The legislature has specifically provided through Section 8-111(D) of the present Act [Section that Courts have no jurisdiction to hear independent actions for civil rights violations. It is clear that the legislature intended the Act, with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for redress of alleged human rights violations [Citations removed]. Debates on Senate Bill 1377, which became the Human Rights Act, confirm that the legislature intended by the Act to avoid direct access to the Courts for redress of civil rights violations. (81st Ill. Gen. Assem., Transcript of House Proceedings, June 22, 1979, at 133, 146; June 25, 1979, at 87.) Significantly, a proposed Amendment to the Bill which would have allowed civil actions in addition to or in lieu of the remedies provided in the Act was tabled. 81st Ill. Gen. Assem., Transcript of House Proceedings, June 22, 1977, at 158-59." (485 N.E.2d at 315, 92 Ill.Dec. at 504)

In *Mein* the plaintiff's claim was age discrimination.

Significantly, in an opinion of the Illinois Appellate Court rendered one and one half years before *Mein,* the Court had held that the Illinois Courts had no jurisdiction to entertain claims of civil rights violations, except in reviewing decisions of the Illinois Human Rights Commission via the Administrative Review Act or in granting temporary relief during the pendency of the administrative proceedings before the Human Rights Department or the Human Rights Commission. (*People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist., 1984).) The Appellate Court stated:

> "It is settled that even if a court is one of general jurisdiction, when its power to act in a particular matter is controlled by Statute, the court is governed by the rules of limited jurisdiction." (461 N.E.2d at 508, 77 Ill.Dec. at 885.)

Arlington Park Race Track was also cited and discussed in Alton's Appellant's Brief filed with the Illinois Appellate Court.

Despite the earlier decision of the Illinois Appellate Court in *Arlington Park Race Track* and the earlier decision of the Illinois Supreme Court in *Mein,* and despite the discussion of these cases and raising of the jurisdictional issue in ALTON's Brief filed with the Illinois Appellate Court, CAHOON made no argument before the Appellate Court that a finding of lack of jurisdiction in this age discrimination claim would be violative of the Supremacy Clause of the U. S. Constitution. The first time CAHOON made any argument that the Statute, as so construed, was violative of the Supremacy Clause was in the Petition for Rehearing filed by CAHOON after the Appellate Court rendered its opinion in this case, as is admitted by CAHOON in the Jurisdictional Statement that he has filed with this U. S. Supreme Court. (See page 5 of the Jurisdictional Statement filed by CAHOON.)

The Appellate Court in this case did not base its decision on or otherwise discuss the Supremacy Clause of the United States Constitution or any other portion of the Constitution or any Amendment thereto. The Petition for Rehearing filed by CAHOON with the Appellate Court was denied without an opinion; and the Petition filed by CAHOON with the Illinois Supreme Court was denied without opinion.

In view of the earlier opinions in *Mein* and *Arlington Park Race Track,* and in view of the jurisdictional issue raised by ALTON before the Appellate Court, it cannot be said that the Appellate Court's ruling in this case was unanticipated. The Supremacy Clause argument, having

been presented for the first time in the Petition for Rehearing filed by CAHOON in the Appellate Court was not timely and properly made. This Court should rule that it is without jurisdiction to entertain this appeal.

———o———

CONCLUSION

Because of the above and foregoing reasons, the Appellees, ALTON PACKAGING CORPORATION, JEFFERSON SMURFIT CORPORATION, and JEFFERSON SMURFIT GROUP, LTD., pray that the Court dismiss this appeal or affirm the judgment of the Illinois Appellate Court for the Fifth District.

Respectfully Submitted,

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Counsel for Appellees

APPENDIX

APPENDIX A

NO. 5-85-0770

IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

LEO CAHOON, Plaintiff-Appellee, -vs- ALTON PACKAGING CORPORATION; JEFFERSON SMURFIT CORPORATION; and JEFFERSON SMURFIT GROUP, LTD., Defendants-Appellants.	Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois No. 82-L-627 Honorable Horace L. Calvo, Judge Presiding

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

5. *ARGUMENT*

A

THE JUDGMENT ENTERED BY THE TRIAL COURT AS TO THE AGE DISCRIMINATION CLAIM IS VOID AND UNENFORCEABLE BECAUSE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THAT CLAIM

Section 8-111(D) of the Illinois Human Rights Act (hereinafter H.R.A.) (Ill.Rev.Stat., Ch. 68, Par. 8-111(D)), effective July 1, 1980, provides:

> "(D) *Limitation.* Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject matter of an alleged civil rights violation other than as set forth in this Act."

Section 1-103(D) of the H.R.A. (Ill.Rev.Stat., Ch. 68, Par. 1-103(D)) defines the term "civil rights violation" as including, without limitation, the acts set forth in Sections 2-102, 2-103, 3-102, 3-103, 3-104, 3-104.1, 3-105, 4-102, 4-103, 5-102, 5A-102, and 6-101 of the H.R.A.

Section 2-102(A) of the H.R.A. provides:

> "It is a civil rights violation:
>
> (A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination."

Section 1-103(Q) of the H.R.A. (Ill.Rev.Stat., Ch. 68, Par. 1-103(Q)) defines the term "unlawful discrimination" in the following manner:

> "(Q) *Unlawful Discrimination.* 'Unlawful discrimination' means discrimination against a person be-

cause of his or her race, color, religion, national origin, ancestry, *age,* sex, marital status, handicap or unfavorable discharge from military service as those terms are defined in this Section." (emphasis added.)

The term "age" is defined under Section 1-103(A) (Ill.Rev.Stat., Ch. 68, Par. 1-103(A)) as "the chronological age of a person who is 40 but not yet 70 years old."

Very recently the Illinois Supreme Court, in the case of *Mein v. Masonite Corporation,* (Docket No. 60422, Sept., 1985), was asked to construe the meaning of the jurisdictional limitation imposed on the Illinois Courts by Section 8-111(D) of the H.R.A. In that case, the Supreme Court made it very clear that the Circuit Courts of this State have no subject matter jurisdiction to entertain, *ab initio,* suits for civil rights violations alleged to have occurred in this State. The Supreme Court stated:

> "*The legislature has specifically provided through section 8-111(D) of the present Act, which is set out above, that courts have no jurisdiction to hear independent actions for civil rights violations. It is clear that the legislature intended the Act, with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for redress of alleged human rights violations.* (See *Thakkar v. Wilson Enterprises, Inc.* (1983), 120 Ill.App.3d 878; *Dykstra v. Crestwood Bank* (1983), 117 Ill.App.3d 821; *Armstrong v. Freeman United Coal Mining Co.* (1983), 112 Ill.App.3d 1020.) Debates on Senate Bill 1377, which became the Human Rights Act, confirm that the legislature intended by the Act to avoid direct access to the courts for redress of civil rights violations. (81st Ill.Gen.Assem., Transcript of House Proceedings, June 22, 1979, at 133, 146; June 25, 1979, at 87.) Significantly, a proposed amendment to the bill which would have allowed civil actions in addition to or in

> lieu of the remedies provided in the Act was tabled. 81st Ill.Gen.Assem., Transcript of House Proceedings, June 22, 1979, at 158-59." (*Mein v. Masonite Corporation, supra,* slip opinion p. 4; emphasis added.)

As explained earlier by the Illinois Appellate Court in *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* (1st Dist. 1984) 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 at 884-885, the only jurisdiction the Illinois Circuit Courts have in cases of alleged civil rights violations consists of reviewing decisions of the Human Rights Commission via the Administrative Review Act (Ill.Rev.Stat., Ch. 68, Par. 8-111(A)) and granting temporary relief during the pendency of administrative proceedings before the Human Rights Department or the Human Rights Commission. (Ill.Rev.Stat., Ch. 68, Par. 7-104)

It is clear from the face of the Plaintiff's Amended Complaint (C118) that the Plaintiff sued the Defendants because of alleged unlawful discrimination in employment because of Plaintiff's age, specifically, Plaintiff's discharge from employment, which occurred in this State on December 1, 1981. It is also clear that the allegations of the Plaintiff's Amended Complaint allege a "civil rights violation", as that term is defined in the H.R.A. Because of Section 8-111(D) of the H.R.A., the Circuit Court was without subject matter jurisdiction to entertain this part of the Plaintiff's suit, and the judgment entered by the Circuit Court in favor of the Plaintiff is void and unenforceable.

A judgment entered by a Court which lacks subject matter jurisdiction is void and can be attacked on that basis at any time, including for the first time on appeal;

for there can be no waiver of subject matter jurisdiction, nor can a party be estopped by failing to raise the question of jurisdiction in the Trial Court. (*Toman v. Park Castles Apartment Building Corp.,* (1940), 375 Ill. 293, 31 N.E.2d 299, 302; *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corp., supra,* 77 Ill.Dec. at 885; *Talandis Const. Corp. v. Illinois Building Authority,* (1st Dist. 1978), 60 Ill.App.3d 715, 377 N.E.2d 237, 18 Ill.Dec. 84, 87; *Hill v. Daley,* (1st Dist. 1975), 28 Ill.App.3d 202, 328 N.E.2d 142; 14 I.L.P., Courts, Section 24, pp. 194-195.)

The Plaintiff might argue that subject matter jurisdiction of this cause was given to the Illinois Courts by the ADEA, specifically that part of the ADEA which states:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. . . " (29 U.S.C.A., Par. 626(c)(1).)

However, the mere fact that the United States Congress, by a Federal Act, declares that State Courts shall have concurrent jurisdiction of a particular cause of action does not require a State's Courts to exercise jurisdiction over such actions. (*Ex parte Crandall,* (7th Cir. 1931), 53 F.2d 969, 970, cert. den., 285 U.S. 540, 52 S.Ct. 312, 76 L.Ed. 933; 21 C.J.S., Courts, Sec. 126, p. 190.) Each state, subject to restrictions of the Federal Constitution, determines the limits of jurisdiction of its own Courts and the characters of the controversies which shall be heard in them. (*Wall v. Chesapeake & Ohio Ry. Co.* (1919), 290 Ill. 227, 125 N.E. 20) This seems particularly so when the cause

of action involves a right created by Statute rather than by common law. (See *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corp., supra,* 77 Ill.Dec. at 885; and see *Wall v. Chesapeake & Ohio Ry. Co., supra,* involving the statutory creation of a right of action for wrongful death.)

In Illinois there was no common law cause of action for age discrimination. Although the Illinois Circuit Courts would have subject matter jurisdiction over alleged civil rights violations based on age under the ADEA if they were Courts of "competent jurisdiction", they are not Courts "of competent jurisdiction" for any "civil rights violations", except for temporary relief in matters pending before the Human Rights Department or the Human Rights Commission or for review of decisions of the Commission.

The judgment of the Circuit Court in this cause, insofar as it pertains to the Age Discrimination claim, should be vacated as void and unenforceable.

(Pages 21-25 of Alton's Appellant's Brief before the Illinois Appellate Court.)

APPENDIX B

No. 5-85-0770

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

LEO CAHOON,	)	Appeal from the Circuit Court of Madison County,
Plaintiff-Appellee,	)	Illinois
vs.	)	
	)	No. 82-L-627
ALTON PACKAGING CORPORATION; et al.,	)	
	)	The Honorable Horace L. Calvo,
Defendants-Appellants.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
LEO CAHOON

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James R. Mendillo
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ORAL ARGUMENT REQUESTED

A. *THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.*

Plaintiff's Complaint alleged a violation of the Federal Age Discrimination Employment Act (ADEA), 29 U.S.C.A. § 621, *et seq.* (C. 118-125) 29 U.S.C.A. § 626(C)(1) states:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."

It is obvious from this statutory language that the United States Congress has determined that state and federal courts shall have concurrent jurisdiction, which means that the plaintiff may institute his action in either state or federal court. *See, e.g., Jacobi v. High Point Label, Inc.,* 442 F.Supp. 518, 520 (M.D. N.C. 1977) "Clearly Congress intended for a person aggrieved by a violation of the Age Discrimination Act to have the right to bring his action in state court." 442 F.Supp. at 521.

Eagleburger v. City of Springfield, 677 S.W.2d 914 (Mo. Ct.App. 1984) reached the same result and held it had subject matter jurisdiction of an ADEA claim. This determination is consistent with the legislative history which stated the ADEA provided for concurrent federal and state actions. 1967 *U.S. Code Cong. & Ad. News* (90th Cong) at 2218. The same decision was reached in *Baldwin v. Sears,* 667 F.2d 458, 461 (5th Cir. 1982). In fact, the only apparent dispute in the area of jurisdiction of the ADEA is whether a defendant has the right to remove to federal court a case filed in state court. *See, e.g., Jacobi*

v. High Point Label, Inc., 442 F.Supp. 518 (M.D. N.C. 1977) and the discussion therein.

Whether one considers the obligation of state courts to enforce claims arising under federal statutes as obligatory or permissive makes no difference in the instant case, as even those cases which suggest the state court's duty is only permissive still prohibit discrimination against federeral claims. *See,* Wright & Miller, *Federal Practice and Procedure,* Vol. 16, § 4024 (1977). As pointed out therein, it is generally accepted that the state courts are not free to refuse enforcement of federal claims, and that rights created by act of Congress are properly enforced in state court absent some contrary provision by Congress. Defendants erroneously rely on *Ex Parte Crandall,* 53 F.2d 969 (7th Cir. 1931) as in 1958 the Illinois Supreme Court held that *Ex Parte Crandall* "no longer represents the law." *James v. Grand Truck Western RR Co.,* 14 Ill.2d 356, 152 N.E.2d 858, 866 (1958).

In *Alberty v. Daniel,* 25 Ill.App.3d 291, 323 N.E.2d 110 (1st Dist. 1974), it was held that a claim under the Federal Civil Rights Act, 42 U.S.C. § 1983, was properly brought in the Illinois Circuit Court and that the courts of the State of Illinois had concurrent jurisdiction under that statute. *Accord, Reidelberger v. Bi-State Dev. Agency,* 8 Ill.2d 121, 133 N.E.2d 272 (Ill. 1956), holding that in the absence of federal constitutional or statutory provisions limiting jurisdiction to federal courts, state courts have authority to enforce rights under the Constitution or statutes of the United States. *See also, Luker v. Nelson,* 341 F.Supp. 111 (N.D. Ill. 1972). The same result has been reached in cases brought under the Federal Employers'

Liability Act, 45 U.S.C.A. § 56. *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698, 62 S.Ct. 827, 86 LEd. 1129 (1942).

It is, therefore, evident that the Illinois Circuit Courts are courts of competent jurisdiction with the authority to entertain actions brought under federal statutes, or the Federal Constitution, absent an express Congressional mandate to the contrary, and there is no such mandate with respect to the ADEA.

Defendants' reliance upon the recent case of *Mein v. Masonite Corp.*, — Ill.2d —, 485 N.E.2d 312 (1985) is also misplaced. In *Mein*, plaintiff filed a suit alleging wrongful discharge in violation of the public policy of the State of Illinois, alleging that the public policy prohibits age discrimination in the work place. The suit was not based upon the Illinois Human Rights Act nor upon the Federal ADEA, but rather was asserted as a common law cause of action for retaliatory discharge pursuant to the rule of *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The Supreme Court, in deciding *Mein*, found that the legislature had specifically provided in the Human Rights Act that Illinois courts have no jurisdiction to hear independent actions for civil rights violations "*except as otherwise provided by law.*" *Mein*, 485 N.E.2d at 315, *quoting, Ill. Rev. Stat.*, 1983 Ch 68, § 8-111(b). (emphasis added)

The Illinois legislature has no authority to restrict, overrule, or otherwise reject substantive rights created by the United States Congress. *Parks v. Ill. Dept. of Mental Health*, 110 Ill.App.3d 184, 441 N.E.2d 1209 (1st Dist. 1982).

(Pages 20-22 of Cahoon's Appellee's Brief before the Illinois Appellate Court.)

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No. 86-1728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO CAHOON,
Appellant,

vs.

ALTON PACKAGING CORPORATION,
JEFFERSON SMURFIT CORPORATION, and
JEFFERSON SMURFIT GROUP, LTD.,
Appellees.

On Appeal From The Appellate Court
of Illinois, Fifth District

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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This Court has jurisdiction, which should be exercised in order to correct a rulng which has significant repercussions, not only for victims of civil rights deprivations, but for all persons asserting a claim under any federal law where state jurisdiction is authorized. Defendants' argument that plaintiff did not properly raise the constitutional question presented is in error as plaintiff did raise the constitutional question in the Appellate Court in his Appellee's Brief. In addition, the decision of the Illinois Appellate Court rested upon a basis not before it and not argued by defendants (exhaustion of administrative remedies), and therefore was an unanticipated act.

A review of both defendants' and plaintiff's argument in the Appellate Court, Appendices A and B of Motion To Dismiss Appeal Or To Affirm The Judgment Of The State Court, will reflect that exhaustion of administrative remedies was not the issue raised by defendants; rather, subject matter jurisdiction was the issue raised and addressed by plaintiff in response. Plaintiff endeavored to illustrate to the Appellate Court in his brief that Illinois trial courts did have subject matter jurisdiction of ADEA claims. Admittedly, plaintiff did not dwell upon, or discuss in depth, the constitutional ramifications of a decision contrary to his position since the law on the point quite clearly and overwhelmingly favored his position that state courts are vested with subject matter jurisdiction of ADEA claims. Nevertheless, plaintiff did specifically state at that time that the Illinois legislature did not have the authority to take away plaintiff's substantive rights as created by the Congress, and therefore could not enact legislation that prohibited its courts from hearing a claim which Congress said it should hear:

> The Illinois legislature has no authority to restrict, overrule, or otherwise reject substantive rights created by the United States Congress. *Parks v. Illinois Department of Mental Health,* 110 Ill.App.3d 184, 441 N.E.2d 1209 (1st Dist. 1982). *Page 2 of Appellee's (Cahoon's) Brief before the Illinois Appellate Court, Motion to Dismiss Appeal or to Affirm the Judgment of the State Court at App. 10.*

A review of the opinion in *Parks v. Illinois Dept. of Mental Health,* 110 Ill.App.3d 184, 441 N.E.2d 1209, 1211 (1st Dist. 1982) reveals that no provision of a constitution other than Article VI, Section 2 of the United States Constitution (the Supremacy Clause) was at issue or discussed in that opinion, and therefore there could be no doubt to defendants or to the Appellate Court that the basis of plaintiff's argument was the Supremacy Clause.

In fact, the Appellate Court itself in the second full paragraph from the end of its opinion specifically refers to plaintiff's argu-

ment and summarily dismisses same, first by concluding that the ADEA "does not appear to support a preemption argument", and then by concluding that plaintiff "does not expressly argue preemption". *Cahoon v. Alton Packaging Co.,* 148 Ill.App.3d 480, 499 N.E.2d 522, 524 (5th Dist. 1986). However, such statements by the court are merely self-serving statements used to boot-strap its position.

It must be emphasized that at the time subject matter jurisdiction was first raised by defendants, in their Appellants' Brief in the Appellate Court, it was but one of approximately eight issues presented for review following the trial, which necessarily limited the depth of the discussion. Nevertheless, contrary to defendants' position, the issue of subject matter jurisdiction was directly confronted, and the constitutional question asserted.

Where the federal question is created by an unanticipated act of the state court, then it is raised in a timely fashion even though it is raised for the first time in a petition for rehearing. *Brinkerhoff-Farris Trust Co. v. Hill,* 281 U.S. 673, 677-78 (1930); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 85-86, n. 9 (1980). In the event that this Court determines that the constitutional issue was not adequately raised in plaintiff's Appellate Court Brief, plaintiff submits that any such inadequacy was the result of the unanticipated determination by the Appellate Court that exhaustion of administrative remedies was a condition precedent to state court subject matter jurisdiction. Such a decision was not contemplated primarily because it was not argued, but also because of this Court's decision in *Oscar Mayer & Company v. Evans,* 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). Appellees' suggestion that plaintiff was on notice to anticipate this unlikely ruling because of *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985) and *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist. 1984)

is unsupportable. Neither case had anything to do either with the federal ADEA or with exhaustion of administrative remedies. *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985) was not brought under any state or federal statute, but rather was a retaliatory discharge case alleging that plaintiff's dismissal in retaliation for age was violative of the public policy of the State of Illinois. The Illinois Supreme Court held that plaintiff's complaint failed to state a cause of action.

Equally misplaced is appellees' reliance on *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist. 1984). In this case, the cause of action was expressly filed under the Illinois Human Rights Act by the Illinois Department of Human Rights, and the court properly found jurisdiction under that Act to be in the administrative agency.

Defendants now question this Court's jurisdiction to hear plaintiff's claim, just as they originally questioned the Illinois Human Rights Commission's subject matter jurisdiction and just as they questioned the Illinois Circuit Court's subject matter jurisdiction (on appeal after the trial). The single time plaintiff was able to have his case considered on the merits (in the trial court), he prevailed. The Illinois appellate courts have made it clear, by the Appellate decision and by the subsequent two refusals to hear the case further, that they do not consider either the substance of this plaintiff's case or the closing of its courts to federal claims to be a significant or worthwhile issue. However, if this decision is allowed to stand, there is not reason why its application will not be applied across the board, as advocated by defendants, to exclude jurisdiction in Illinois courts for claims brought under any federal civil rights statute, whether the ADEA; Title VII; 42 U.S.C. §1981 or 42 U.S.C. §1983; or The Fair Labor Standard Act. Similar state legislation could also be enacted to foreclose suits under other federal acts such as the Jones or Federal Employers Liability Acts.

It is respectfully requested by Leo Cahoon that this Court note probable jurisdiction of this appeal, and deny defendants' motion.

Respectfully submitted,

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